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93-730

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

Whether prisoners who perform labor or render services in connection with programs operated and maintained under the authority of California's Prison Industry Authority are entitled to payment for their work at the minimum wage rates established under the Fair Labor Standards Act, 29 U.S.C. section 201 et seq.

LIST OF PARTIES

Petitioners are the defendants in Jernigan v. Prison Industry Authority et seq., No. CIV-S-92-1408 GEB PAN, an action under the FLSA for damages, declaratory and injunctive relief and back wages filed in the U.S. District Court, Eastern District of California. The second amended complaint in this District Court action was filed on April 1, 1993. Plaintiff Jernigan, the real party in interest in the instant petition, is an inmate employed by petitioner Prison Industry Authority and represented by counsel.

Petitioners are the state of California defendants in the lower court action. They are the State of California; the Prison Industry Authority; the Prison Industry Board; James Gomez, in his official capacities as Director of Corrections and Chairman, Prison Industry Board; David King, General Manager of the Prison Industry Authority; Joella Fazio, Executive Officer of the Prison Industry Board; and 50 Does.

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Petitioners Prison Industry Authority, et al., pray that a writ of mandamus issue to review the August 27, 1993 order of the United States District Court for the Eastern District denying petitioners' motion to dismiss plaintiff's FLSA complaint upon the authority of Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II].

OPINIONS BELOW

The Eastern District opinion is unpublished and is contained in the appendix of this petition.

JURISDICTION

The jurisdiction of this court to review the Eastern District order is discretionary and authorized by 28 U.S.C. section 1651(a).

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 29 U.S.C. section 201 et seq., and in particular the following:

> [Section 203(b).] "Commerce" means trade, commerce, transportations, transmission, or communication among the several States or between any State and any place outside thereof.
>
> Section 203(d).] "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . .
>
> [Section 203(e)(2)(C).] In the case of an individual employed by a public agency, ["employee"] means any individual employed by a State, political subdivision of a State, or an interstate government agency, other than [non-civil service employees, or elected or appointed officials, or advisors to office-holders.]
>
> [Section 203(g).] "Employ" means to suffer or permit to work.
>
> [Section 203(i).] "Goods" means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but

does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.

[Section 203(j).] "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

[Section 206(a).] Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, [the minimum wage declared by Congress.]

STATEMENT OF THE CASE

The instant petition comes before this Court after denial of petitioners' motion to dismiss the inmate plaintiff's April 1, 1993 second amended complaint for FLSA relief. In lieu of an answer, petitioners, the

defendants in the action, filed a motion to dismiss the action on January 20, 1993 and subsequent briefing with respect to the second amended complaint. Petitioners' motion was premised upon Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II].[1/]

The Eastern District ruled on the motion on August 27, 1993.[2/] In pertinent part, the lower court held:

> [Petitioners] fail to establish that the applicable California statutes create, as a matter of law, a relationship between Plaintiffs and the California prisons which is analogous to the hard labor requirement in [Hale II]. Moreover, Plaintiffs make an offer of proof that they will be able to show that their participation with the Prison Industries is voluntary, rather than

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1. The inmate plaintiff in Hale sought a petition for certiorari. The petition was denied certiorari on November 1, 1993. Hale v. Arizona, No. 93-353. On October 4, 1993, this Court denied certiorari in Harker v. State Use Industries, No. 93-5298, a case involving issues similar to Hale. See Argument I(C), infra.

2. The motion was consolidated for motion hearing only with another similar case, Burleson v. Prison Industry Authority, No. CIV S-93-200 GEB PAN. The instant petition concerns the Jernigan case only because consideration of the two cases would add nothing to the discussion of the relevant legal issues.

> a condition of confinement. [Petitioners'] motions to dismiss are, therefore, denied and Plaintiffs may develop a factual record in their cases.

Appendix, Order at 2.

On September 7, 1993, petitioners filed a request for a 28 U.S.C. section 1292(b) certification of the denial for appeal. That request is pending before the Eastern District, although petitioners received a very strong impression at the October 24, 1993 hearing on the motion that the request would be denied. Petitioners are awaiting the denial and will transmit a copy of that denial to this Court when they receive it. In addition, the transcript of the certification hearing has been ordered and will be presented to this Court as soon as it is received.

STATEMENT OF FACTS

In the instant case, inmate Jernigan, the plaintiff, filed his second amended complaint on April 1, 1993. The complaint was filed on behalf of inmate Jernigan and other similarly situated inmates confined within the California Department of Corrections. Plaintiff alleged that he was employed by the Prison Industry Authority and that he was paid less than the minimum wage prescribed by the FLSA. Plaintiff sought declaratory and injunctive relief as well as back wages and damages for himself and other similarly situated inmates.

STATEMENT OF NECESSITY FOR EXTRAORDINARY RELIEF

This case involves an issue of immense importance for the administration of justice in the several states and within the Federal correctional system. Each state and the federal correctional system utilizes inmates as workers in various prison industries. The circuits are split as to whether these workers are accorded the minimum wage under the FLSA and therefore there is no national interpretation of the fundamental law governing pay for workers in the United States.

Within the Ninth Circuit alone, there has been unusual uncertainty as to this point of law. Within the two years from 1991 to 1993, the Ninth Circuit has issued an opinion holding that inmates need not be paid the minimum wage; reversed itself in 1992; and upon rehearing of the 1992 case, issued a compromise opinion which seems to partake of both sides in this debate on minimum wages. Examination of the 1993 opinion (Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II] shows that it answers nothing about the fundamental applicability of the FLSA to prison inmates. The opinion simply does not provide any legal criteria for determining whether an inmate must be paid the minimum wage. Inmate Hale has sought certiorari and his petition is presently pending before this Court. Hale v. Arizona, No. 93-353.

The parties to the litigation in the lower court and all inmate plaintiffs and government attorneys with cases pending in state and federal trial courts have a common

desire to know the applicable law before they begin discovery in their cases. The instant litigation, being a class action, will surely require the infusion of substantial sums for discovery for both sides. These expenditures would be simple economic waste if this Court renders a definitive decision after the termination of the litigation.

The numerous conflicting decisions and the sheer number of new decisions on this point are a sure indicator that this Court must intervene soon and end the confusion which is rampant in the trial courts of this nation. While petitioners have sought certification of the order issued by the Eastern District, this is a discretionary act. Moreover, even if certification is issued, the Ninth Circuit decision will not be had within nine months or more and in any case that Circuit is of several minds, a fact evidenced by its last three decisions on point. Finally, although a Senate bill is pending hearing at this point in time, its passage is uncertain.

Petitioners do not seek relief in the form of a writ directing the lower court to certify the issue for appeal. Indeed, because the lower court has not yet formally ruled on the certification motion, this petition might be deemed premature on that ground. Moreover, redirecting the Ninth Circuit, in effect, to reexamine the instant case in light of Hale provides no adequate relief for petitioners because of the confused state of the law among the circuits. Petitioners also respectfully suggest that a reading of Hale and Jernigan together indicates that there is no certainty within the Ninth Circuit as to the governing law.

Instead, petitioners request extraordinary relief in the form of a hearing before this Court to finally decide the legal issues raised in Hale and the other cases cited herein in order to prevent the cost and waste of judicial resources in prosecuting a case where there is no consensus as to the interpretation of the relevant law, either in the Ninth Circuit or across the nation. No matter who wins the case at trial, appeal of the decision to the Ninth Circuit is inevitable. After the Ninth Circuit resolution, perhaps two years from now, this Court will still have to decide the precise legal issue presented in this petition. Surely if mandate serves a purpose, it is to prevent this sorry projected history of delay and irresolution.

ARGUMENT

THIS COURT MUST ISSUE A WRIT OF MANDAMUS TO PREVENT BURDENSOME DISCOVERY AND DELAYED TRIAL IN A FLSA MINIMUM WAGE CASE FOR WHICH THERE IS NO CONSENSUS AS TO THE APPLICABLE LAW

The key relevant provision of the FLSA are section 203 and 206 of Title 29, U.S. Code. The principal definitions are:

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . .[Certain exceptions which do not apply to inmates are listed.]
>
> (g) "Employ" means to suffer or permit to work.
>
> (i) "Goods" means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include

> goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Section 206 states that the minimum wage shall be paid by an employer to an employee if the employee is engaged in commerce or the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce. Thus any employee, inmate or not, must be engaged in commerce as defined in section 203 in order to claim the minimum wage.

Despite the clarity of basic concepts explicit in these definitions of terms, there is no consensus as to when inmates must be paid the minimum wage if they work within the prison system. The underlying circumstances of this case are undisputed in the record, as the sole pleading in the record is the complaint. Therefore, the instant case provides an ideal context for resolution of the

instant legal dispute. Nearly every federal court in the land has said its piece on this subject, with the Ninth Circuit having issued three conflicting opinions on the point in a two-year time period.

There is simply no unanimity on this issue and this Court must undertake to provide an answer to the uncertainty in the area. The courts of the nation, in the absence of any explicit Congressional expression of opinion as to whether inmates are covered by the FLSA, have created a morass of cacophonic tests, criteria and opinion resulting from the piecemeal litigation on this issue. The fate of the principal prison rehabilitative programs in every state cannot be left suspended until the underlying case wends its way from trial court to Ninth Circuit to this Court.

A. THE SPLIT AMONG THE CIRCUITS.

1. Ninth Circuit Case Law.

The Ninth Circuit law leading to Hale II is a checkered one. One panel of the Ninth Circuit issued Gilbreath v. Cutter Biological, Inc., 981 F.2d 1320 (9th Cir. 1991), an opinion consistent with the Hale II decision. However, the 1992 Hale I decision (Hale v. Arizona, 967 F.2d 1356 (9th Cir. 1992)) contradicts Gilbreath. Moreover, the Hale II decision was an en banc 11 to 2 decision. The minority within the Ninth Circuit who believe that Hale I was correctly decided remain unconvinced as to the wisdom of Hale II. See Hale, 993 F.2d at 1389.

Indeed, the confusion inherent in this sequence of cases was evident even prior to the issuance of Hale II. In Morgan v. MacDonald, __ F.Supp.__, 1992 U.S. Dist. LEXIS 14463 (D.Nev. 9/14/92), the District Court summarized the situation:

> In Gilbreath, . . . Judge Trott, writing for the plurality, concluded that inmates never can be employees under the FLSA. . . In a concurring opinion, Judge Rymer refused to decide whether inmates are precluded from [being employees]. . . In a dissenting opinion, Judge D.W. Nelson concluded that inmates are employees. . . Thus, after Gilbreath, one judge believed that inmates are not employees under the FLSA, one judge believed that inmates are employees . . . , and one judge refused to address the issue.
>
> In [Hale I], Judge Nelson, writing for the majority, was joined by Judge Pregerson in her conclusion that the FLSA protects inmates as employees. Further, even though Judge Fletcher dissented, she implicitly agreed that the FLSA applies to inmates . . . Consequently, considering Gilbreath and Hale, three judges believe that inmates are covered by the FLSA, one judge believes the opposite, and one judge has not addressed the issue.

In Morgan, the District Court followed the Hale I decision and after an examination of the economic realities of the

situation, found that no minimum wage was to be paid. Id. at 14462-3. Given the dictates of Hale II, Morgan is incorrect because it utilizes the economic realities test. See Hale, 993 F.2d at 1394.

This internal division would seem to have been resolved by Hale II decision. However, the framing of the instant case by counsel and this court's denial of the motion to dismiss indicate that substantial legal questions remain. Hale II states that: "[W]e are constrained not to hold as a matter of law that prisoners may never be 'employees' of a prison." Hale, 993 F.2d at 1393. The Eastern District, in interpreting Hale upon petitioners' motion to dismiss in Jernigan, has taken another step and ruled that those inmates, if any, who are not "at hard labor", may be "employees" under the FLSA. Appendix at 2.

The instant motion to dismiss in Jernigan is not based on any substantial holding set forth in Hale II; rather, it is the lower court's deduction from Hale's refusal to absolutely bar application of the FLSA and the fact that Arizona inmates are "at hard labor". Suffice to say, the Ninth Circuit never considered California's penal statutes and regulations at all. Despite Hale, there is a substantial legal question relating to whether "hard labor" is a factor of relevance and whether the California law directs "hard labor" because Hale does not address these issues.

There is a substantial legal question as to whether Hale II is correct. Hale seems to be a compromise decision which does not bar all inmates from FLSA

coverage yet does not specify the relevant and sufficient conditions which will trigger coverage. As such, it is but one decision among the numerous circuit court decisions which conflict with each other. The present state of the law is at best confused, with new opinions constantly being issued. See Hale, 993 F.2d at 1393.

Hale and Jernigan do not deal with definitions of "commerce" or "goods". They deal with definitions of "employee" and "unfair competition". This can be shown by an examination of a principal case, Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992). Vanskike deals with an inmate who was performing janitorial and kitchen helper duties directly for the institution. The court held that the inmate was not covered by the FLSA, stating:

> Because status as an "employee" for purposes of the FLSA depends on the totality of circumstances rather than any technical label, courts must examine the "economic reality" of the working relationship.

The court noted that prisoners are not categorically excluded from coverage and that where inmates were employed by entities deemed private enterprises under state law, the terms of employment were crucial. Where the inmate worked directly for the institution, that institution's control over the inmate does not stem from any remunerative relationship or bargained-for exchange of labor for consideration. Therefore, the inmate could not be an employee.

Vanskike also considered whether cheap prison labor constituted unfair competition, noting that if it were, those who provided simple labor would also be entitled to the minimum wage if they were employees.

> For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job-someone who would have to be paid $4.25 an hour.

The court found that simple inmate labor was not unfair competition, the ultimate evil the FLSA was designed to combat, although it implicitly found that such labor was "commerce" under the FLSA.

> For the government, competition in the marketplace is not a dominant mode and profits are not the ultimate goal. A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity.

Therefore, Vanskike states that if governmental participation in a market is not for profit, the FLSA does not apply. This relates to Hale and Jernigan in that both of these cases seem to say that if an inmate is not providing work "at hard labor", then it must be covered by the FLSA. The gap between the two lines of cases is enormous. Under Vanskike, proof of "for-profit" inmate activity is required; under the other cases, proof of "non-hard" labor is required.

Obviously, because there is no Supreme Court case on the subject, no one can predict which test applies especially after the Jernigan denial. Assume an on-site prison facility produces T shirts for inmate use. If the California laws and regulations do not require that an inmate produce the shirts at hard labor, then under Hale and Jernigan there is a substantial possibility that minimum wages are required. Under Vanskike, unless there is a regulation or statute which states as a matter of law that the shirts are produced for profit, or there is a factual situation[3/] which shows that a profit is produced,

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3. Beyond the issue of basic definitions of "employee" and "unfair competition", there is the issue of whether any product is in "commerce", i.e. whether the product comprises "goods". Whether an employee is engaged in commerce is an issue determined on a case by case basis. Coverage under the FLSA depends on the special circumstances of the particular business involved. The Supreme Court has recognized that the Act's purpose is "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." Overstreet v. North Shore Corp., 318 U.S. 125, 128 (1943); Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943). The Act is to be interpreted broadly and guided by practical considerations. Id.; Brennan v. Wilson Building, Inc., 478 F.2d 1090 (5th Cir. 1973), cert. den. 414 U.S. 855. No de minimus rule applies to the Act. Any regular contact with commerce, no matter how small, will result in coverage. Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946). The key question is whether the work of the employees is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it rather than an isolated local

no minimum wage need be paid. In short, no one can say which particular products are exempt from the minimum wage because the law is unclear as to what, in general, will trigger the minimum wage.

B. CASE LAW REGARDING INMATES EMPLOYED BY NON-PRISON EMPLOYERS.

Complementing the confusion in law within the Ninth Circuit are the other circuit cases dealing with FLSA coverage of inmates who are not directly employed by their prisons or by the relevant prison industry system are covered. See Annotation, 110 ALR Fed 839 (1992). These cases represent the situation in which it is most likely that inmates would be paid the minimum wage, i.e. where the inmates are working for unrelated enterprises. Three groups of cases appear. The first holds there was no congressional intent to have inmates covered by the FLSA. Alexander v. Sara, 721 F.2d 149 (5th Cir. 1983); Worsley v. Lash, 421 F.Supp. 556 (N.D. Ind. 1976), but see Woodall v. Partilla, 581 F.Supp. 1066 (N.D. Ill. 1984); see Sims v. Parke Davis & Co., 453 F.2d 1259 (6th Cir. 1971), cert. den. 405 U.S. 978.

Another line of cases held that inmate's hard labor belonged to the prison and the FLSA did not apply. Miller v. Dukakis, 961 F.2d 7 (1st Cir. 1992), cert. den. 113 S.Ct. 666; Hudgins v. Hart, 323 F.Supp. 898 (E.D. La.

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activity. Mitchell v. Vollmer & Co., 349 U.S. 427 (1955).

1971); Huntley v. Gunn Furniture, 79 F.Supp. 110 (D. Mich. 1948); Worsley v. Lash, supra; Lavigne v. Sara, 424 So.2d 273 (La. 1982).

A contrary line of cases holds that the FLSA's goals were compatible with coverage of inmates. Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984); Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990). These cases in general propose criteria for the analysis of when the FLSA does apply to prisoners. Most acknowledge the "economic reality" test. Sims v. Parke Davis & Co., supra; Woodall v. Partilla, supra; Prieur v. D.C.I. Plasma, 726 P.2d 1372 (Nev. 1986). Civilly committed juveniles have been held to be entitled to minimum wages (King v. Carey, 405 F.Supp. 41 (W.D. N.Y. 1975) while INS detainees have been found ineligible for minimum wages. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).

C. CASE LAW DEALING WITH EMPLOYMENT BY PRISONS OR PRISON INDUSTRIES.

The following cases deal directly with the issue of whether inmates employed in prison industries are due the minimum wage. In Harker v. State Use Industries, 1993 U.S. App. LEXIS 5905 (4th Cir. 1993), cert. den. __U.S. __ (Oct. 4, 1993), the Fourth Circuit found that the FLSA did not apply to inmates employed at a prison workshop located within the penal facility. The court held that the inmates were working in the prison industries "not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training." There was no bargained-for exchange of labor for economic gain, and

indeed the essence of the inmate-industry relationship was custodial. Finally, the inmates had no credible claim to a minimum wage because the institution provided the necessities of life and the inmates did not have to have a minimum wage to insure that they could purchase these necessities. Finally, the passage of the Ashurst-Sumners Act was found to indicate that Congress had no intention to cover inmates when it enacted the FLSA. The Ashurst-Sumners Act criminalizes the transportation of prison-made goods where to do so would threaten fair competition. See also Franks v. Director, __F.2d__, 1993 U.S. App. LEXIS 26863 (10th Cir. 1993).

In Sprouse v. Federal Prison Industries, 480 F.2d 1 (5th Cir. 1973), cert. den. 414 U.S. 1095, Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992), George v. Badger State Industries, 1993 U.S. Dist. LEXIS 10242 (W.D. Wisc. 1993), and Emory v. U.S., 2 Cl. Ct. 579 (1983), a similar result was reached. On the other hand, as noted in section a(1) supra, Hale squarely holds that FLSA employment within prison industries is possible for inmates.

This sampling indicates the hopeless state of affairs prevailing throughout the county. Given the conflicting circuit opinions, this Court must issue a final decision on the legal issue.

D. LEGISLATIVE REMEDIES.

Pending in the Labor Committee of the U.S. Senate is S. 1115 (Reid, Nev.) which amends sections 202 and

213 of the FLSA to exclude inmates from coverage under the FLSA. At the request of Senator Reid, the General Accounting Office prepared a report on prisoner labor. GAO, Prisoner Labor-Perspectives on Paying the Federal Minimum Wage (GPO, May 1993). The report reviews the prison industries in Arizona, Florida, Nevada, and Virginia, and the federal prison industry system. The "Results in Brief" section of this report states:

> If the prison systems we visited were required to pay minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees (e.g., charges for room and board) were imposed on the inmates.
>
> Prison systems officials consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wage. They believed that less inmate work means more idle time and increased potential for violence and misconduct. They also noted other potentially adverse consequences for prison operations (e.g., routine maintenance performed less frequently) and generally saw few advantages to paying minimum wage.

> On the other hand, some of the organizations we visited had a different perspective on inmate pay, based on the idea that prison work experiences should be more like those in the general public. Minimum or prevailing wages are a part of the "factories with fences" concept that many criminal justice, private industry, and other officials supported in the 1980's. That concept called for improved inmate work and training opportunities by (1) making greater use of prison industries, particularly those operated by the private sector, and (2) operating the industries under normal business and pay practices. Some organizations also believed that by not paying inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.

Id. at 2.

At best, the prospect for congressional resolution of the relevant legal issues appears problematic. It appears that after a hearing on S. 1115 in the Senate Labor Committee on October 28, 1993, that there will be no further advancement of the bill. In any case, this court should not defer to Congress where the fundamental legal issues are of such pressing urgency and where the best efforts of our intermediate appellate courts have only created confusion.

CONCLUSION

Extraordinary relief must be granted by this Court to reconcile a split among the circuits as to the law; to prevent needless waste in class action discovery and trial if the lower court proceeds without certification of an appeal; and to rule on a matter of national importance.

Petitioners desire a resolution from this Court. This Court will ultimately have to consider the issue and the Ninth Circuit has already issued three opinions on the subject. The piecemeal approach to this FLSA issue has resulted in many opinions in the Ninth Circuit and the rest of the nation and produced no certainty. At this point, stare decisis amounts to a failure of the system.

DATED: November 4, 1993

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(FILED 8/27/93)

GALVIN BURLESON, et al., Plaintiffs, v. THE STATE OF CALIFORNIA and the PRISON INDUSTRY AUTHORITY, Defendants.	CIV S-93-200 GEB PAN ORDER
GARY V. JERNIGAN, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants.	CIV S-92-1408 GEB PAN

Defendants' move to dismiss plaintiffs' claims under the Fair Labor Standards Act in each of the

above related cases relying upon the Ninth Circuit's decision in *Hale v. State of Arizona*, _F.2d_ (1993). In that case, the Ninth Circuit found that Arizona statutes required prisoners to perform hard labor as a punishment during their incarceration. Defendants fail to establish that the applicable California statutes create, as a matter of law, a relationship between Plaintiffs and the California prisons which is analogous to the hard labor requirement in *Hale*. Moreover, Plaintiffs make a offer of proof that they will be able to show that their participation with the Prison Industries is voluntary, rather than a condition of confinement. Defendant's motions to dismiss are, therefore, denied and Plaintiffs may develop a factual record in their cases.

Jernigan v. Gomez is before the court on Findings and Recommendations of Magistrate Judge Hollows, having been referred to Magistrate Judge Hollows pursuant to 28 U.S.C. § 636 and E.D. Cal. Rule 302. Magistrate Judge Hollows recommended that the *Jernigan* Plaintiffs' claim under 42 U.S.C. § 1983 be dismissed. The *Jernigan* Plaintiffs did not object to that recommendation and indicated at the hearing on this matter their nonopposition to the dismissal of their § 19 83 claim. Therefore, the *Jernigan* Plaintiffs' claim under 28 U.S.C. § 1983 is dismissed. Dismissal of this claim completes the purposes for which this case was referred to the Magistrate Judge. Therefore *Jernigan v. Gomez*

shall now be designated an action under the Fair Labor Standards Act rather than a prisoner civil rights case.

IT IS SO ORDERED.

DATED: August 26, 1993

/s/ Garland E. Burrell

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT
JUDGE

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On November 5, 1993, I served the attached **Petition for Writ of Mandamus to the United States District Court, Eastern District of California** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

RICHARD W. NICHOLS
McDonough, Holland & Allen
555 Capitol Mall, Ninth Floor
Sacramento, CA 95814

Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 5th day of November, 1993.

Rosalind Zender
Notary Public in and for said
County and State

ROSALIND ZENDER
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My Commission Expires March 14, 1995

93-730
No. _____

COPY

Supreme Court, U.S.
FILED
NOV - 8 1993
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,

Petitioners.

SUPPLEMENTAL APPENDIX

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of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
KENNETH C. YOUNG, Senior Assistant
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,
Petitioners.

SUPPLEMENTAL APPENDIX

On November 3, 1993, the Eastern District denied certification of the appeal from its August 27, 1993 order denying defendants' motion to dismiss. Appendix A; Petition at 7-8. In doing so, the Eastern District appears to have modified its former position that the state "hard labor" statutes were the crucial legal issue. Appendix A at A-2. Instead, the Eastern District stated that Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993), announced an "economic reality" test[1/] which did not foreclose the

---

1. It appears that Hale specifically rejects the "economic reality" test as it is commonly understood. Hale v. Arizona, 993 F.2d at 1394. Therefore it is technically incorrect to state that the "economic reality" test, a term of art, is applicable to cases within the Ninth Circuit. In fact, Hale adopts a "totality of the circumstances" test and explicitly rejects the classic "economic reality" test announced in Bonnette v. Calif. Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). Hale v. Arizona, 993 F.2d at 1394-1395.

plaintiff's action in the instant case, Jernigan v. Gomez, No. CIV S-92-1408 GEB PAN. Appendix B at B-6.

DATED: November 9, 1993

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
KENNETH C. YOUNG
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JOAN W. CAVANAGH, Supervising
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Counsel of Record
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APPENDIX B

FILED 11/3/93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GALVIN BURLESON, et al., Plaintiffs, v. THE STATE OF CALIFORNIA and the PRISON INDUSTRY AUTHORITY, Defendants.	)	CIV S-93-200 GEB PAN ORDER
GARY V. JERNIGAN, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants.	)	CIV S-92-1408 GEB PAN

On August 30, 1993, this Court denied Defendants' motion to dismiss Plaintiffs' claims on the ground that Defendants failed to establish a statutory relationship

between Plaintiffs and the California prisons which is analogous to the hard labor requirement in Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993). Plaintiffs also argued that questions of fact existed as to whether their participation in the PIA programs was "voluntary" and thus whether as a matter of "economic reality" was the functional equivalent of "hard labor" referred to in Hale.

Defendants in both cases request certification of the following issue: Does Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993), bar prison inmates from claiming the minimum wage authorized by the Fair Labor Standards Act (29 U.S.C. § 201 et seq.)? Plaintiffs' counsel in the Jernigan case suggests that this question is inappropriate and that the appropriate question is as follows:

> Are prisoners who perform labor or render services in connection with programs operated and maintained under the authority of California's Prison Industry Authority entitled to payment therefore at the minimum wage rates established under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.?

Plaintiffs in the Burleson case oppose certification of either question.

ANALYSIS

28 U.S.C. § 1292(b) permits certification of interlocutory appeals if an order presents:

> a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Motions to certify interlocutory appeal are granted only under exceptional circumstances. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S.Ct. 2454, 2461 (1978). The Court must find three facts present before granting certification: (1) there must be a controlling question of law, (2) there must be substantial grounds for difference of opinion regarding that controlling legal question, and (3) the Court must determine that an immediate appeal may materially advance the ultimate termination of the litigation. In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982).

The question for certification posed by Defendants is not appropriate, since Hale expressly found that prisoners are not categorically excluded from the FLSA. Hale at 1392. The Ninth Circuit then decided:

> whether inmates working for a prison, in a program structured by the prison

> pursuant to state law requiring prisoners to work at hard labor, are "employees" of the prison within the meaning of the FLSA.

Id. at 1393. Construing the language of the FLSA in light of the Arizona statute requiring "hard labor," the court held that "whether there is an employment relationship under the FLSA is tested by '"economic reality" rather than "technical concepts."'" Id. at 1393-4 (quoting Goldberg v. Whitaker House Coop., 366 U.S. 28, 33, 81 S.Ct. 933, 936 (1961). Under the "economic reality" test, courts are to:

> consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records.

Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). However, the court went on the refine the "economic realities" test for application to the prison inmates in Arizona as follows:

> The case of inmate labor is different from this type of situation whether

> labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. . . . Under Arizona law, the state "has the authority to require that each able-bodied prisoner . . . engage in hard labor for not less than forty hours per week. . . ."

Hale, 993 F.2d at 1394. The court concluded that as to the plaintiffs in that case:

> the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary. . . . Because prisoners in Hale and Fuller worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution.

Id. at 1395. In these passages and each time the Hale court states its conclusion, it carefully confines the holding to prisoners working at hard labor required by

their incarceration as set forth in Arizona's statutory scheme. Defendants' argued in their motion to dismiss that the holding in Hale barred Plaintiffs' FLSA claim as a matter of law. Since the plain language of Hale provides otherwise, the Court declines to certify this issue. The Defendants' prior motion did not address the question the Jernigan Plaintiffs' propose for certification and therefore the Court did not consider it. Since the question has not yet been presented to the district court it is not appropriate for certification.

The motion to dismiss was denied on the basis that Hale expressly did not hold that a prison/prisoner relationship cannot also be an employer/employee relationship, and Defendants failed to establish that the economic reality of Plaintiffs' labor belonged to the prison institution as was found in Hale. Hale, 993 F.2d at 1395. Because of the narrow issue that was noticed for hearing and briefed by the parties, this ruling does not involve a legal question on which there exists substantial grounds for difference of opinion in the Ninth Circuit. Therefore the motion to certify is denied.

IT IS SO ORDERED.

DATED: October 27, 1993

/s/ Garland E. Burrell

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 30 1993
OFFICE OF THE CLERK

No. 93-730

In The
Supreme Court of the United States
October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,
Petitioners.

On Petition for Writ of Mandamus
to the United States District Court,
Eastern District of California

BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN

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BEST AVAILABLE COPY

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No. 93-730

In The
Supreme Court of the United States
October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,
Petitioners.

On Petition for Writ of Mandamus
to the United States District Court,
Eastern District of California

BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN

Respondent Gary V. Jernigan, plaintiff in forma pauperis below, by and through his undersigned attorney, does herewith submit the following brief in opposition to petitioners' petition for writ of mandamus to the United States District Court for the Eastern District of California.

Respondent does not disagree with petitioners' Question Presented, petitioners' List of Parties, the presentation by

petitioners of appendices "A" and "B" as the relevant Opinions Below, ~~or~~ petitioners' Statement of Facts.

JURISDICTION

For the reasons set forth in Section I of his argument in opposition to petitioners' petition, respondent asserts that this Court does not have jurisdiction under 28 U.S.C. § 1651(a), and that no other basis for the discretionary exercise of this Court's jurisdiction exists.

STATUTE INVOLVED

Respondent agrees that the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., cited by petitioners are relevant to this proceeding. Respondent asserts, however, that various statutes of the State of California are also relevant to this proceeding. See Section III of respondent's argument in opposition to petitioners' petition.

STATEMENT OF THE CASE

Respondent does not disagree with petitioners' Statement of the Case as set forth in their petition. Respondent also agrees

that the District Court filed an additional Order on November 3, 1993, denying petitioners' motion for certification pursuant to 28 U.S.C. § 1292(b). Respondent disagrees with petitioners' characterization (in their Supplemental Appendix) of that November 3 Order by the District Court as constituting a "modifi[cation of] its former position," and asserts that that Order is entirely consistent with the District Court's Order of August 27, 1993. The pertinent portions of the November 3 Order read as follows:

> "Defendants' [sic] argued in their motion to dismiss that the holding in Hale barred Plaintiffs' FLSA claim as a matter of law. Since the plain language of Hale provides otherwise, the Court declines to certify this issue. The Defendants' prior motion did not address the question the Jernigan Plaintiffs' [sic] propose for certification and therefore the Court did not consider it. Since the question has not yet been presented to the district court it is not appropriate for certification. [¶] The motion to dismiss was denied on the basis that Hale expressly did not hold that a prison/prisoner relationship cannot also be an employer/employee relationship, and Defendants failed to establish that the economic reality of Plaintiffs' labor belonged to the prison institution as was found in Hale. Hale, 993 F.2d at 1395."

ARGUMENT

I. THE COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1651(a).

Jurisdiction under the All Writs Act (28 U.S.C. § 1651(a)) is limited to those situations in which judicial writs may be issued by courts as "necessary or appropriate in aid of their respective jurisdictions." This Court does not presently have jurisdiction over any pending case which the instant petition would be "in aid of."

As indicated by petitioners themselves, in footnote 1, page 4 of their petition, this Court recently had two opportunities to address the questions which are inherent in the instant petition. It declined the opportunity to do so, by denying certiorari in Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993), cert. den. No. 93-5298, October 4, 1993 ["Harker"], and in Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993), cert. den. No. 93-353, November 4, 1993 ["Hale"]. Respondent is not aware of any other prisoner FLSA case pending before the Court at this time.

II. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH THE APPLICABLE NINTH CIRCUIT STANDARD, WHICH REQUIRES A FACTUAL INQUIRY INTO THE "ECONOMIC REALITY" OF THE WORK RELATIONSHIP.

There is, in essence, a two-fold split of authority in the circuits on the issue of FLSA treatment of prisoners. Some circuits, including the Ninth, determine whether an employer-employee relationship exists in a prison context by looking at the "economic reality" of the relationship between the parties. Hale, supra, 993 F.2d at 1394. The Ninth Circuit, in Hale, simply determined that the "economic reality" of a prison-prisoner relationship, under factual circumstances where the prisoner is obligated to work under a statute imposing a "hard labor" requirement as an incident of the prisoner's sentence, is such that the prisoner's work cannot be considered to be "voluntary," and therefore does not constitute "employment." The "economic reality" in such a situation is that the prison "owns" the prisoner's labor. Thus, a "hard labor" statute is merely an example of one particular type of "economic reality."

The "economic reality" test is a fact-intensive test, involving such inquiries as (a) the nature of the sentence imposed, (b) the location of the work performed, (c) the identity

of the entity for which the work is performed, (d) the voluntary or involuntary nature of the work assignment, and many other inquiries peculiar to the particular work program. It does not depend upon "technical concepts." Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33 (1961).

The "economic reality" test applied in the Ninth Circuit is consistent with similar tests in other federal circuits which have spoken to the issue. Although application of the standard may vary on a factual basis peculiar to each particular situation, the standard itself is uniform. The "economic reality" test is expressly articulated as the applicable standard in the Second [Carter v. Dutchess Community College, 735 F.2d 8, 12 (1984)], Fifth [Watson v. Graves, 909 F.2d 1549, 1554 (1990)], and Sixth [Sims v. Parke Davis & Company, 453 F.2d 1259 (1971), adopting district court opinion, see Sims v. Parke Davis & Co., 334 F.Supp. 774, 787 (E.D. Mich., 1971)] Circuits, as well as in the Ninth Circuit.

In the instant case there has been absolutely no factual inquiry into the various matters which would be relevant to application of an "economic reality" test. Thus, if the "economic

reality" test is an appropriate standard, this case is not ripe for decision by any court, much less by this Court.

The opposing line of authority, articulated by the Fourth Circuit in Harker, supra, is to the effect that prisoners, as a class, are categorically excluded from coverage under the FLSA. Harker is a "bright line" case which expressly rejects the "economic reality" test. Harker, supra, 990 F.2d at 135.

In respondent's view Harker stands alone. There are cases from other circuits which articulate concepts generally consistent with Harker, but those decisions in fact go on to discuss the particular factual context of the individual claimants asserting FLSA entitlements, i.e., the "economic reality" in which those claimants find themselves. See, e.g., decisions of the First [Miller v. Dukakis, 961 F.2d 7 (1992) (work for the prison at the prison pursuant to state law establishing compensation system for both prison industry and general prison work), Seventh [Vanskike v. Peters, 974 F.2d 806 (1992) (performance of "forced labor" directly for the prison itself)] and Tenth [Franks v. Oklahoma State Industries, 1993 U.S. App. LEXIS 26863 (October 18, 1993) (work performed in prison) Circuits. Cf. Wentworth v. Solem, 548 F.2d 773

(8th Cir. 1977) (decided prior to Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)).

This Court recently had an opportunity to extend the Harker "bright line" throughout the country, but it declined to do so. The instant case, which involves significant issues of state law concerning the nature of California's particular prison industry program, is not an appropriate vehicle for deciding whether the "bright line" standard or the "economic reality" standard should be the applicable test.

III. RELEVANT CALIFORNIA STATUTES RAISE FACTUAL QUESTIONS WHICH THE DISTRICT COURT HAS NOT HAD AN OPPORTUNITY TO ADDRESS.

Various California statutes referenced below demonstrate the peculiar nature of this particular case. This is not a case involving general prison labor, and it is not a case involving mandatory work assignments by the Director of Corrections ("Director"). To the contrary, this case involves a program which has been carefully crafted by the California legislature (California Penal Code § 2801):

> "(a) To develop and operate industrial, agricultural, and service enterprises employing prisoners in institutions under the jurisdiction of the Department of Corrections, which enterprises

> may be located either within those institutions or elsewhere, all as may be determined by the [prison industry] authority.
>
> (b) To create and maintain working conditions within the enterprises as much like those which prevail in private industry as possible, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills.
>
> (c) To operate a work program for prisoners which will ultimately be self-supporting by generating sufficient funds from the sale of products and services to pay all the expenses of the program, and one which will provide goods and services which are or will be used by the Department of Corrections, thereby reducing the cost of its operation."

To be sure, the Prison Industry Authority is a part of the Department of Corrections ("Department"). The Prison Industry Authority ("Authority") and the Director are separate lines of authority within the Department. California Penal Code § 5001. General prison labor in California is required of prisoners by the Department, however, only in accordance with regulations of the Director (California Penal Code § 2700):

> "The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections." (Emphasis supplied.)

California's prison industries program work assignments, however, are not under the control of the Director (California Penal Code § 2701):

> "The Department of Corrections is hereby authorized and empowered to cause the prisoners in the state prisons of this state to be employed in the rendering of such services as are now, or may hereafter be, needed by the state, or any political subdivision thereof, . . . except for services provided by enterprises under the jurisdiction of the Prison Industry Authority. The Department of Corrections may enter into contracts for the purposes of this article." (Emphasis supplied.)

While the Director may authorize a prisoner to apply to work in a prison industry program, it is the Authority itself which determines whether that prisoner will be accepted into the program. California's Prison Industry Authority is under the policy direction of a board of directors ("Board"), of which the Director is but one member out of eleven. California Penal Code § 2802. The Director is chairman and administrative head of the Board, California Penal Code § 2803, but the chief administrative officer of the Authority is a general manager appointed by the Board, California Penal Code § 2808(e). With specified exceptions, the Board is authorized to "have all the powers and do all the things which the board of directors of a

private corporation would do." California Penal Code § 2808. Among other things that includes the power

> "(h) To establish, expand, diminish, or discontinue industrial, agricultural and service enterprises under its jurisdiction to enable the authority to operate as a self-supporting organization, to provide as much employment for inmates as is feasible, and to provide diversified work activities to minimize the impact on existing private industry in the state."

Prisoner compensation rates for work under the prison industries program are set by the Board, not by the Director. California Penal Code § 2811.

All of the foregoing, and other statutory and regulatory provisions, are peculiar to California. There has been no factual inquiry concerning the implications of any of them. Accordingly, there has been no factual inquiry concerning the "economic reality" of California's program. Unless the Court is prepared to adopt the Harker "bright line" test excluding prisoners per se from FLSA coverage, this case simply is not ripe for consideration by this Court at this time. If the Court were prepared to do so, it could have granted certiorari in Harker for that purpose.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that petitioners' petition for writ of mandamus should be denied.

DATED: November 30, 1993

Respectfully submitted,

Richard W. Nichols

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Gary V. Jernigan

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF SACRAMENTO)

Adele España-Purpur, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814.

On November 30, 1993, I served the attached **BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
KENNETH C. YOUNG, Senior Assistant
Attorney General
JOAN W. CAVANAGH, Supervising
Deputy Attorney General
JAMES CHING, Supervising Deputy
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Telephone: (916) 323-1948
Attorneys for Petitioners

Adele España Purpur
AFFIANT

Subscribed and sworn to before me
this 30th day of November, 1993.

Mary M. Amaral
Notary Public in and for said
County and State

PWR1 MARY M. AMARAL
Comm. # 993919
NOTARY PUBLIC - CALIFORNIA
Sacramento County
My Comm. Expires July 28, 1997 PWR1